



**JMJ v Republic (Criminal Appeal E007 of 2023)  
[2024] KEHC 8154 (KLR) (Crim) (8 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8154 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E007 OF 2023  
LN MUTENDE, J  
JULY 8, 2024**

**BETWEEN**

**JMJ ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against sentence of Hon. A.R Kithinji SRM delivered  
in Chief Magistrate’s Court Makadara Criminal Case No 4714 of 2013)*

**JUDGMENT**

1. MJM, the Appellant, was arraigned following an allegation of having contravened the law by committing the offence of Incest contrary to section 20(1) of the [Sexual Offences Act](#). This was as a result of violating sexually his daughter L. N. He also faced an alternative charge of committing an Indecent Act with the child aged 15 years by touching her private parts namely vagina with his penis, but, was found guilty of the principal charge, convicted and sentenced to serve fifteen years imprisonment.
2. Aggrieved, right at the outset the appellant opted to mitigate on sentence on grounds that: the trial court failed to consider Section 333(2) of the [Criminal Procedure Code](#); and, that the entire duration served was not taken into account.
3. Subsequently, the appellant amended the grounds of appeal. The substratum of the appeal is that: the learned magistrate failed to consider the appellants’ mitigating factors as provided for under the Judiciary sentencing policy guidelines; the court failed to appreciate that he was a first offender and remorseful; the age of the appellant was not considered; mitigating factors and circumstances were not considered; the sentence imposed was harsh and excessive.



4. This is a case where the victim was the appellant's biological daughter. Her mother deserted the matrimonial home after being seriously assaulted by the appellant consequently leaving the victim aged 15 years but with special needs as she was mentally retarded with her siblings under the care of the appellant. On the fateful night, the 29<sup>th</sup> October, 2013, the appellant violated her sexually. The matter was reported to the police. Investigations carried out resulted into the appellant being indicted. Having denied the charge, he was taken through full trial, convicted and sentenced to serve fifteen (15) years imprisonment.
5. It is urged by the appellant that the sentence was not appropriate since mitigation was not considered. That he was a first offender and a minimum sentence should have been considered per the principle enunciated in *R v Otieno* [1985] eKLR. That he is remorseful and he prays for a second chance. He attributed the offending character to bad company and alcohol hence promised to be an advocate of enlightening others on social values against domestic violence if released.
6. Further, that he is 68 years old and suffers unjustified hardship in custody contrary to the provisions of Article 57 of the *Constitution*, on the right of older members of the society to live in dignity. That paragraph 20:29 of our sentencing policy directions provide that terminal illness and elderly persons should be considered.
7. He also submits that he is entitled to benefit from least severe sentence since the law changed with the new *Constitution* and the case of *Muruatetu*. He prays for a lesser or non- custodial sentence and that the court considers a community service order under Section 35 of the *Penal Code* so as to spend the rest of his days with his family.
8. The State /Respondent in opposing the appeal submits that the sentence should be enhanced so as to be commensurate with the offence; that the appellant has not demonstrated remorse and cannot prove reconciliation and forgiveness by her daughter and family.
9. This being a first appeal, the court's duty is to reassess and re-evaluate what transpired at trial and come up with an independent conclusion. The court must discharge its appellate duty keeping in mind that it did not have the opportunity of seeing, hearing and observing the demeanor of witnesses which enabled the court reach the sentence.
10. It is rare for an appellate court to interfere with the sentence of the trial court. The reason being that sentencing is the responsibility of the trial court which is discretionary. In *Ogalo s/o Owour v Reginan* [1954] EACA 270, the East African Court of Appeal set out cardinal principles that must guide this court in disposing of the instant appeal against sentence. The court delivered itself thus:

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by trial judge unless, as was said in *Jame v R*[1950] 18 EACA 147;

“It is evident that the judge has acted upon some wrong principles or overlooked some material factor. To this we would add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.”



11. In *Bernard Kimani Gacheru v Republic* [2002] eKLR, the Court of Appeal later reaffirmed this position holding that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

12. Section 20 (1) of the *Sexual Offences Act* that the appellant contravened provides that:

Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

13. It is not in dispute that the victim was 15 years old and less advanced in mental development than is usual. The appellant was given a chance to mitigate in line with the provisions of Section 216 of the *Criminal Procedure Code*, and a presentence report was considered, therefore, the trial complied with the right to fair trial and sentencing guidelines.

14. A sentence must be commensurate with the criminal action as a matter of principle and all factors must be considered as a whole. In *Omuse v R* [2009] KLR 214, the court held that: sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and the proper exercise of discretion in sentencing requires the Court to consider that fact and circumstances of the case in their entirety before settling for any given sentence. Paragraph 23:7.7 of the *Judiciary Sentencing Policy Guidelines* provide for aggravating factors which include targeting of vulnerable groups such as children, elderly persons and persons with disability. The trial court found 15-year imprisonment reasonable in the circumstances. It is submitted by the State that the sentence be enhanced yet no notice of appeal was put in.

15. In *J.J.W v Republic* [2013] eKLR the Court of Appeal held that:

“It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the *Criminal Procedure Code*. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in



good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.”

16. Considering circumstances in which the offence was committed, the 15-year sentence meted out by the trial court was lenient but since no notice was put in for enhancement of sentence for consideration, this court would not consider it.

17. The appellant did not post bail and had been in remand custody from the date of arrest which period was not accounted for at the time of the sentence . Paragraph 7:10 of the [Judiciary Sentencing Policy Guidelines](#) provides that:

The proviso to section 333 (2) of the [Criminal Procedure Code](#) obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.

18. The appellant was arrested on 8/10/2013 and sentenced on 22/11/2018 spending an aggregate of 5 years in custody at the time of the sentence. This period should have been accounted for. Therefore, the sentence as meted is affirmed, save that the appeal succeeds to that extent of this court taking into consideration time spent in remand custody. In the result the sentence is reviewed, to be effective from the date of arrest, the 8/10/2013.

19. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI,**

**THIS 8TH DAY OF JULY, 2024.**

**L. N. MUTENDE**

**JUDGE**

